Supreme Court, U.S.
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No. 00-1891

IN THE

Supreme Court of the United States

GEORGE C. SAMSON, *et al.*,

Petitioners,

v.

APOLLO RESOURCES, INC.,
doing business as APOLLO SERVICES,
JEFFREY A. REDDOCH and CHIQUITA REDDOCH,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Apollo Resources, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

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SUMMARY OF OPPOSITION

The claims of Petitioners are supported by three faulty premises – one which relates to the law, the other which relates to the facts and the final one which relates to Petitioners' assertion that this Court should grant a writ of certiorari under the facts of this case.

Petitioners' legal premise in support of their claims is that the established body of law finding the fluctuating workweek pay plan under 29 C.F.R. 778.114 ("FWW") is compliant with the Fair Labor Standards Act ("FLSA"), going back almost 60 years to this Honorable Court's decision in the case of *Overnight Motor Transport Co. v. Missel*, 316 U.S. 572, 62 S. Ct. 1216 (1942), should be overruled. Such a suggestion is completely without merit and without any support from applicable legal authority.

The second premise asserted by the Petitioners relates to the facts of what actually occurred during their employment with Apollo Resources, Inc. ("Apollo") and what was established at trial. Judge Richard T. Haik, the trier of fact, reviewed extensive documentary evidence and heard extensive testimony from all six plaintiffs, as well as from four members of Apollo's management (called under cross-examination), observed their demeanor and even personally questioned virtually every person who testified and – after all of that – Judge Haik found the testimony of the plaintiffs to be "**contrived**," "**orchestrated**," "**incredible**" and *un*credible.[1] Therefore, the second pillar allegedly supporting Petitioners' claims fell as a result of their own testimony at trial. Judge Haik, a seasoned federal trial judge (who has been on the federal bench for approximately 10 years,

1. *See*, for example, Judge Haik's comments at MJML Tr. pp. 13, 47, 49, 54 and 57. NOTE: Citations to the trial transcript will be abbreviated "TT." Citations to the transcript of the hearing on Apollo's Motion for Judgment as a Matter of Law will be abbreviated "MJML Tr." Citations to District Court Judge Richard T. Haik's Addition Reasons for Judgment will be abbreviated "ARJ," a copy of which is attached to Petitioners' Brief as Appendix "D."

and who had previously served as a state district court judge for approximately 7 years before his federal appointment) commented during trial that he felt that someone had "**hustled up all these cases**" because the plaintiffs "didn't like" the way there were getting paid, and once they were no longer working for Apollo they tried to "bite" Apollo in the "back." Tr. p. 929 and MJML Tr. p. 48. Furthermore, Judge Haik stated that there was no doubt in his mind that the plaintiffs had gotten together to "**contrive some kind of statement to show that they were treated unfairly**," and also stated that the testimony of the six plaintiffs whose cases were tried was the "**best orchestrated among plaintiffs I've ever seen in my life**." MJML, Tr. p. 54, ln. 9-23.

The final premise asserted by Petitioners is the suggestion that this Court should grant a writ of certiorari in this case. Nothing could be further from the truth – (i) there is no conflict between federal appellate court circuits on the legal issues presented; (ii) there is ample authority that the FLSA, the regulations on the FWW pay plan (29 C.F.R. 778.114) and the relevant opinion letters of the Department of Labor ("DOL") permit the occasional disciplinary deductions taken by Apollo from the FWW salaries of certain of the plaintiffs when faced with the willful absences of those plaintiffs; and (iii) the factual and credibility findings of the trial court are not appropriate for review by way of writ of certiorari.[2]

With the collapse of these three pillars, Petitioners' argument for the issuance of a writ of certiorari also falls. The trial judge – having the benefit of seven days of trial testimony – properly saw no reason for the case to proceed when plaintiffs rested and, accordingly, granted Apollo's motion for judgment as a matter of law.

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2. Rule 10 of the Supreme Court Rules states that, "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

STATEMENT OF THE CASE

A. Procedural Background

On or about May 27, 1997, George Samson and Kevin Smith filed the matter entitled "*George Samson and Kevin Smith v. Apollo Resources, Inc.*" bearing Docket No. 97-1053 against Apollo (this lawsuit shall be referred to herein as the "Samson Suit"). In November and December of 1997, plaintiffs amended their Complaint a total of four times in order to permit five more plaintiffs to join the Samson Suit, as well as to name Jeffrey A. Reddoch and his wife, Chiquita Reddoch, as individual defendants. On or about January 14, 1998, William Melancon (legal counsel for the plaintiffs in the Samson Suit) filed a lawsuit against Apollo on behalf of Crawford Norton and Lester Weaver encaptioned "*Crawford R. Norton and Lester D. Weaver v. Apollo Resources, Inc.*" bearing Docket No. 98-0062 (referred to herein as the "Norton Suit").

In early March of 1998, the parties agreed to consolidate for trial the Samson Suit and the Norton Suit (referred to herein as the "Collective Action"). The parties agreed to continue the trial date until January of 1999 (later moved to March 1, 1999), in light of Petitioners' desire to make the consolidated action a "collective action" under Section 216(b) of the FLSA. 29 U.S.C. § 216(b). Of the over 180 people to whom notification letters were mailed, only 25 additional people decided to join in as collective action members of the Collective Action.

The trial of the Collective Action was conducted from March 1, 1999, through March 9, 1999 (seven days of trial).[3] At the end of the fourth day of trial, Judge Richard T. Haik

3. In Petitioners' case-in-chief, they called the following persons to testify: the six plaintiffs (1) George Samson, III, (2) Jackie D. Hays, (3) Brent C. Manuel, (4) Kevin D. Smith, (5) Norman Landry, and (6) Melvin Kyle Smith, as well as (7) Don Strobel, a fact and expert witness listed by Apollo, and the following members of Apollo's management (8) Jeffrey A. Reddoch (President), (9) Johnnie Daughdrill (Operations Manager), (10) Ben Stonecipher (Administrative Manager), and (11) Charles E. Reeves (Controller), all under cross-examination.

suggested, in the interest of time, that the parties complete the trial for the claims of the six plaintiffs cases who had already testified and then sever the remaining 24 plaintiffs from the trial. The parties agreed.

At the close of Petitioners' case on March 9, 1999 (with respect to the six plaintiffs), Apollo moved the court for a judgment as a matter of law under Federal Rule of Civil Procedure Rule 52(c). After a two hour hearing on the motion, wherein the trial judge heard arguments and made detailed factual findings as to each individual plaintiff, Judge Haik granted Apollo's motion. Judge Haik followed up with Additional Reasons for Judgment, dated April 27, 1999, primarily discussing the legal basis for his ruling on the Rule 52(c) motion (*see* copy attached as Appendix "D" to Petitioners' Brief). A judgment was signed on April 27, 1999.

Petitioners filed an appeal with the Fifth Circuit Court of Appeals, which rendered its opinion on February 20, 2001, resoundingly affirming the decision of the trial court in all respects. Petitioners' petition for panel rehearing was denied on March 20, 2001.

B. Factual Background

Apollo is a Louisiana corporation which has its registered office in Lafayette, Louisiana. Apollo is in the business of providing environmental-related services to the oilfield industry. Jeffrey A. Reddoch is the president and sole shareholder of Apollo.

In 1991, upon being approached by an employee who questioned the way said employee was being paid, Mr. Reddoch immediately contacted the Wage and Hour Division of the Department of Labor ("DOL") to obtain assistance in implementing a pay plan which fit the needs of Apollo as well as complied with the FLSA. TT p. 9 and p. 14.

At that time, Don H. Strobel was the Assistant District Director for the United States Department of Labor in the Enforcement Section (New Orleans). TT p. 85-86. Mr. Strobel

went over the pay plan options and suggested the FWW pay plan. TT p. 14-15. Mr. Strobel forwarded a packet of materials to Mr. Reddoch regarding the FLSA, the FWW (including a copy of 29 C.F.R. 778.114) and related matters. TT p. 15 and p. 88. Mr. Reddoch read the materials and called Mr. Strobel several times over the next several months to discuss issues related to the FWW and its operation. TT p. 88 and p. 98. Mr. Strobel's instructions and explanations to Mr. Reddoch addressed, among other things, when the employer could legitimately take disciplinary deductions from the FWW salary, the fact that only a pro rata portion of the salary had to be paid in the initial and terminal weeks of employment and other such issues. TT p. 88-89.

Mr. Strobel remembered Mr. Reddoch particularly well because of his "good attitude" and the fact that he followed up with a "lot of telephone calls over the publications that we sent him." TT p. 119. Mr. Strobel stated that in his 32 years of experience, he has only encountered "very few" – "probably less than one percent" – of employers who behaved the way Mr. Reddoch did and showed such an attention to detail and interest. TT p. 119.

With regard to the issue of permissible deductions from the FWW salary, Mr. Strobel specifically instructed Mr. Reddoch in 1991 and 1992 that occasional deductions could be made as a disciplinary measure for willful absences or tardiness of the employee, in accordance with: (i) the DOL's Field Operations Handbook (Section 32b04b), a reprint of which is attached hereto as Appendix "A," and (ii) the 1982 opinion letter by DOL Administrator, William Otter (the "Otter Letter"), attached to Petitioners' Brief as Appendix "F." TT p. 49-50, 55-57, 74-75, 88-89 and 1140-1141.

The only person at Apollo authorized to make deductions from an employee's FWW salary is Mr. Reddoch. TT p. 1142 and p. 1165. A decision to make a disciplinary deduction for a willful absence is made by Mr. Reddoch only after securing the facts of the matter and enough information to feel "comfortable"

with the decision. TT p. 1198 and p. 1274. Disciplinary deductions are made infrequently because Apollo wants to try to retain its employees, but, on the other hand, there is a need to have an effective way to discipline employees who "play hooky"; otherwise, the message would go out that Apollo has an "open door policy" on playing hooky and getting paid for it. TT p. 1154 and p. 1273.

Apollo does *not* dock its employees' FWW salaries when they are truly sick; rather, it is Apollo's policy to continue to pay the salary of any employee under the FWW who is truly sick. TT p. 1144 and p. 1228. Apollo has paid the full salary of employees who were out for "over a month" when they were truly sick. TT p. 1144 and p. 1228.

Apollo has a policy requiring employees to bring in a doctor's excuse when they return to work after being absent from work due to sickness. TT p. 1151, p. 1155 and p. 1228. Lead plaintiff, George Samson, admitted that this policy was "generally known" by his coworkers at Apollo. TT p. 246. Although Apollo is generally "pretty lenient" with the doctor's excuse policy, adherence to this policy is particularly required when an employee (who alleges sickness as the reason for the absence): (i) does not call in and personally speak to the manager on duty on the day in question, but instead simply leaves word of the alleged sickness with the answering service; and (ii) that employee is not home to answer the manager's call either during the morning of the day in question or later that afternoon, which gives Apollo a "very good suspicion" regarding the employee's allegation of sickness. TT p. 1153-1156, p. 1252-1253, p. 1261-1262 and p. 1285-1287. In such an event, Mr. Daughdrill, Apollo's Operations Manager, "flags" the day in question on Apollo's attendance records for further investigation and the ultimate presentation of the matter to Mr. Reddoch for review. TT p. 1253 and p. 1287. Mr. Daughdrill is the one who personally makes these two calls (once in the morning and once again in the afternoon) to employees who fall into the suspicious absence category. TT p. 1254-1255 and p. 1285.

If Mr. Daughdrill does not have any reason to disbelieve the employee's allegation that the absence was because of sickness, he does not pursue the matter any further. TT p. 1286-1287. According to Mr. Strobel, who worked for the DOL for over 32 years, the "most common excuse" given by employees who "play hooky" is that they are "sick." TT p. 86 and 115.

There are only four of the six plaintiffs whose cases were tried in this matter who had any deductions made from their salary as disciplinary deductions for willful absences.[4] Judge Haik found, *as a matter of fact*, that all of these deductions were made because of willful absences by the employees in question, to-wit: "Apollo deducted from an employee's weekly salary when the employee willfully absenced himself from work." *See* ARJ (Section E), attached as Appendix "D" to Petitioners' Brief.

With regard to the near simultaneous unexplained absences of George Samson, Kevin Smith and Melvin Smith (the latter two plaintiffs who are brothers) – immediately before and after the same weekend[5] – Mr. Reddoch explained that other Apollo employees (as well as Mr. Daughdrill) had informed him that Mr. Samson and two other people (i.e., the Smith brothers) had missed days around the same weekend and had gone on a hunting or fishing trip and that none of these employees could produce a doctor's excuse.[6] TT p. 1158 and 1162. Mr. Daughdrill heard

4. To-wit: George Samson, III – one workweek involving 10.25 hours; (2) Kevin D. Smith – one workweek involving a total of 12.25 hours; (3) Melvin K. Smith – one workweek involving a total of 1.5 hours; and (4) Norman Landry – three workweeks involving a total of 17 hours.

5. I.e., the days involved were Thursday, October 19, Friday, October 20, Monday, October 23 and Tuesday, October 24, 1995.

6. Mr. Daughdrill explained, by way of example (regarding Melvin Smith's situation), that a notation of "sick" on Apollo's absentee roster is what he puts if "someone said they were sick" (TT p. 1259) – in essence, the notation is only reflective of what the employee *claims* was the reason for the absence, not in any way a determination by Apollo

(Cont'd)

"lots of people" talking in the shop that George Samson, Melvin Smith and Kevin Smith had missed work because they were going on some sort of fishing or hunting trip.[7] TT p. 1258. Mr. Daughdrill told Mr. Reddoch of the information that he had received in this regard. TT p. 1258. Mr. Daughdrill testified that the story he heard about the three employees' absence was a "common rumor" throughout the shop. TT p. 1258. When this information started circulating, Mr. Daughdrill flagged the dates for Mr. Reddoch and Apollo started the investigation. TT p. 1259.

Mr. Reddoch testified that these three employees could not be located when Apollo tried to get in touch with them. TT p. 1166-1167. Mr. Daughdrill and Mr. Reddoch testified that Mr. Daughdrill asked *all three* of these employees to bring in a doctor's excuse upon their return to work, but that *no* such excuse was ever produced.[8] TT p. 1160, p. 1164, p. 1167, p. 1183-1185 and p. 1271-1272. Mr. Reddoch explained that the three employees (George Samson, Kevin Smith and Melvin Smith) left on days that Apollo needed them to work and that Apollo could not find these employees on the days in question. TT p. 1163.

With respect to the deductions from Norman Landry's salary, the first date in question was on April 10, 1995. TT p. 888. Mr. Landry admitted at trial that on the day in question he was "moving." TT p. 888. Mr. Landry conceded that: (i) this was not a day that he showed up for work, (ii) that he was willing

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(Cont'd)
of the truth of that alleged reason. In fact, Apollo, with good reason, questioned the legitimacy of the alleged reason of "sick" for the employees at issue. TT p. 1158, 1162-1167 and p. 1258.

7. Mr. Reddoch explained that the Smith brothers and Mr. Samson are "very close" to each other. TT p. 1166.

8. Judge Haik stated that he was: (i) "very impressed" with the testimony of Mr. Reddoch; and (ii) "very, very impressed" with the testimony of Mr. Daughdrill, as well as "impressed with his demeanor." MJML Tr. p. 21 and p. 64.

to give up that day's pay to go move, (iii) that he did not ask his supervisor, Mr. Daughdrill, if he was going to get paid for the day in question that he moved; (iv) that he knew that there was work for him at Apollo on the date in question; (v) that Mr. Daughdrill never told him that the day in question would be an excused absence; and (vi) that he did not ask Mr. Daughdrill if he was going to get paid for the day that he moved. TT p. 888-891 and p. 909-910.

The second date in question where Mr. Landry's salary was subject to a disciplinary deduction was on July 5, 1995. TT p. 892. Although Mr. Landry alleged at trial that he had gone to the doctor on that date, Mr. Landry admitted that he did not show up for work on that date, which just so happened to be the day following the July 4th holiday. TT p. 892. Mr. Landry conceded that: (i) there was work for him at Apollo on that date in question; (ii) no one from Apollo told him that the date in question would be an excused absence; (iii) not even after he saw that his salary had a deduction against it for that week did he bring any type of doctor's excuse or independent verification of his claim that he was at the doctor on that date; and (iv) nothing prevented him from going to get some type of doctor's slip to show Apollo that he was, in fact, at the doctor on that date. TT p. 892-893.

The final date involving a deduction from Mr. Landry's salary was August 11, 1995. Mr. Landry conceded that this was the day in which he took a "personal day off" – "a little vacation day" where he took his family to New Orleans. TT p. 871 and p. 895. Mr. Landry conceded that: (i) he had only worked for Apollo for less than six months at this time; (ii) he did not have any vacation time to be used for this personal day off; (iii) he would not dispute that Apollo did, in fact, have work for him to do; and (iv) no one in Apollo's management told him that the dates in question were excused or that he was going to be paid for any of the days that he decided to take off. TT p. 895-896 and p. 912. Judge Haik did not believe that *even Mr. Landry* really thought he would get paid for the absence

when he took his family on vacation.[9] MJML Tr. p. 49. Other than his own unbelievable testimony, Mr. Landry offered no evidence at trial to support his allegations.

Mr. Daughdrill testified that he never told either George Samson, Kevin Smith, Melvin Smith or Norman Landry that the days they were willfully absent were "excused." TT p. 1271 and p. 1281. Additionally, Mr. Daughdrill confirmed that there was work at Apollo for all of these men on the dates of their willful absences. TT p. 1281.

In connection with this subject matter, Judge Haik offered the following comments and factual findings:

> I find it **incredible** to believe that Mr. Landry or any of the plaintiffs who felt that they should have gotten paid because they were sick did not try to have that situation corrected at that time, or at least at the time of their next paycheck. These are not babies. They're not children. They're not infants. If in fact and indeed they could have gotten or they did get doctor's excuses some two and a half years later, how much easier could it have been to make the phone call and get it then when they saw that their salaries were deducted when in fact they and others knew that when they brought in sick slips or doctor's excuses, they got paid for that time? But to come back years later and say, wait a minute, no one ever told me is just **incredible** to me. Even a child, when they don't go to school, when they check back in has to bring some type of slip from a mom or dad or a doctor to

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9. To show the extent of Mr. Landry's lack of credibility, a review of pages 896 through 900 of the trial transcript would be *quite* illuminating, since this is where Mr. Landry was *repeatedly* impeached with his deposition (which was taken just two months prior to trial). He testified, either live or in his deposition, that he *expected* to be paid by Apollo if he took days off from work to go shopping, to wash his car, to paint his house or even to go bird watching! For good reason, Judge Haik disbelieved Mr. Landry's testimony.

show that that child was not playing hooky. What they were concerned about here is playing hooky from work, and when you play hooky from work and you can't back it up, the company has a right to deduct. It's not fair to play hooky and get paid, just like it's not fair to play hooky and go to school and not be disciplined in such a manner. It's just not fair. MJML Tr. p. 47-48. [Emphasis added].

There is no doubt in my mind that Mr. Norman Landry, as well as the other plaintiffs in this case, were treated fairly. I find it **astonishing** that they don't realize – or that they can take the stand and say I didn't realize I had to get a slip, a work slip. The testimony was if someone called and talked to Mr. Daughdrill or someone else of some authority besides the answering service, they would call. And if they verified that person was home sick, they didn't have to get a work slip. But if they called and no one was there, they got docked in pay. That's not unreasonable. That's not an unreasonable thing to do. MJML Tr. p. 49. [Emphasis added].

So I think it is incumbent upon the employee when they see that they're docked – I think it is incumbent upon them to show some reason why they shouldn't be at that point. And all they had to do was bring in a doctor's excuse. And they're going to get it two years later? **That's incredible to me. That's incredible.** MJML Tr. p. 50. [Emphasis added].

And to have to believe that the company has to go chase them down and say please bring in your sick slip, you know, you do that to third graders. You don't do it to ninth graders or high school kids. You don't do it to a high school graduate. You don't do it to grown men who have worked before. You

> don't do it. You expect grown men if they have a complaint and they say I didn't get paid and I was sick, to check it out. MJML Tr. p. 60-61.

It should be noted that all of the plaintiffs claiming any disciplinary deductions from their salary signed a sheet in connection with their initial employment orientation which was captioned, "DISREGARD OF ANY OF THE FOLLOWING RULES MAY SUBJECT YOU TO DISCIPLINARY ACTION OR DISCHARGE." TT p. 240-242 (George Samson), p. 966-967 (Kevin Smith), p. 901 (Norman Landry) and p. 811 (Melvin Smith). Item number 12 of the reasons for discipline that were printed on that sheet read as follows, "*Unexcused or excessive absences or tardiness.*" *See* Defendants' Exhibits Samson No. 1, Kevin Smith No. 29, Landry No. 23 and Melvin Smith No. 17A. Therefore, these employees had notice from the start of their employment that, in certain circumstances, disciplinary action could potentially be taken against them by Apollo for unexcused absences.

It is *undisputed* that Apollo does not make a deduction every time an employee is absent from work. TT p. 1140-1141. Petitioners' counsel even admitted on the record that they had no evidence of same to present at trial. TT p. 1140-1141.

The evidence at trial, in fact, showed that of the total hours worked by all of the original 30 plaintiffs while they were employed by Apollo (38,258.75 hours), only about half of them (16) had any disciplinary deductions at all, said deductions (involving 306.25 equivalent hours[10]) which involved *less than 1%* of the total number of hours worked by these 30 plaintiffs. Disciplinary deductions were only present in 33 workweeks of the total of 798 weeks (including initial and terminal weeks) worked by the original 30 plaintiffs. **There were 20 weeks (involving 800**

10. The term "equivalent hours" is used merely to indicate how many hours for which the employee was not paid during that workweek (i.e., deducted for disciplinary reasons) and is calculated by subtracting the actual number of hours worked by the employee during that workweek from the sum of 40 hours.

equivalent hours) in which the original 30 plaintiffs did *not* perform any work at all, but in which Apollo paid their *full* FWW salary. Further evidence at trial established that the value of the equivalent hours deducted from any of the original 30 plaintiffs' salaries ($3,839.81), when compared against the value of the time that the original 30 plaintiffs did *not* perform 40 hours of work during a workweek but, in fact, received their *entire* FWW salary ($29,814.87), *benefitted* the original 30 plaintiffs in the amount of $25,975.06 in the aggregate. TT. p. 1401-1403; Defendants' Exhibit Reeves No. 71.[11] This pay system was obviously a good one as these numbers clearly show.

With regard to the six plaintiffs whose cases were tried, the evidence showed that only 41 equivalent hours were involved in deductions which occurred in a total of just six workweeks (from a total of 183 total workweeks during the six plaintiffs' employment with Apollo), amounting to just 3.3% of the total workweeks in question for said plaintiffs. Additionally, the equivalent hours involved (41 hours) in the disciplinary deductions made to the FWW salary of any of these six plaintiffs amounted to an incredibly low 0.45% (less than 1%) of the total hours worked (9,094.50) by these plaintiffs while employed by Apollo. TT p. 1394-1396 and p. 1426; Defendants' Exhibit Reeves No. 70.

Mr. Strobel, the wage and hour expert who was called to testify by Petitioners during their case-in-chief, testified that the disciplinary deductions made by Apollo with regard to the 30 plaintiffs were unquestionably "occasional" under applicable DOL authority, and were only made for "disciplinary"

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11. Judge Haik took notice of the fact that the plaintiffs did not "complain" when they received their full salary but did not work 40 hours during that workweek — which is the other side of the equation, i.e., the trade off. MJML Tr. p. 30-31. All of the six plaintiffs (except Mr. Manuel) had weeks where they did not work 40 hours but were paid their full salary. *See* MJML Tr. pp. 14, 21, 38-39, 46-47 and 57-58.

reasons – certainly not based on any desire on Apollo's part to "save money." TT p. 108-111.

Mr. Strobel also testified that he performed a review of Apollo's pay policy and found that it complied with applicable statutes and regulations – in fact, Mr. Strobel testified that Apollo was "over generous, over and above what the law required." TT p. 137.[12]

Judge Haik, after the presentation of the entirety of the six plaintiffs' cases, found, *as a matter of fact*, that Apollo did everything it could to comply with applicable law, to-wit:

> Number one, there has been no showing at all in this case thus far that Apollo's actions were willful and, in fact, all of the testimony except for – I can't even say that – even the plaintiffs themselves, although they would like to paint it in the light of willfulness, **all of the testimony is clear to me that there was no willfulness, that the company tried to do everything they could to follow the law, and it went over and above**. MJML Tr. p. 12, L 1-10. [Emphasis added].
>
> **This company dotted their Is and crossed their Ts.** MJML Tr. p. 22, L 2-3. [Emphasis added].
>
> And I have to say, Mr. Reddoch, I was impressed with your testimony. **I think you are trying to run a good shop, and I think you've done everything that you can do to keep it on the up and up.** MJML Tr. p. 64, L 16-19. [Emphasis added].

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12. Mr. Strobel informed the court that, while he was with the DOL, he was involved in a case where some other employer was not using the FWW pay plan properly and that he required the employer to pay. TT p. 140. Therefore, Mr. Strobel's credibility — as the only expert on wage and hour regulations who testified during the trial and whose expert status Petitioners' counsel stipulated to on the record (TT p. 40) — cannot be validly challenged. Petitioners' lawyer conceded on the record that Mr. Strobel's testimony "hurt" Petitioners' case. TT p. 1303.

> I'm a firm believer of receiving what you contract for, and **I think these gentlemen received every penny they contracted for. And some of them even more than they thought they contracted for.**" MJML Tr. p. 65. [Emphasis added].

None of the plaintiffs whose cases were tried contended that their overtime premium was not properly calculated and paid by Apollo pursuant to 29 C.F.R. 778.114; rather, these plaintiffs wanted the entire pay plan thrown out.

Petitioners' solitary offering to the trial court to try to cast Apollo in a bad light with regard to its pay plan was the botched DOL investigation occurring in 1994-1995, which the DOL aborted and did not legally pursue. The only wage and hour expert to testify at trial (Mr. Strobel) disagreed "big time"[13] with the DOL's suggestions that Apollo did anything wrong, since his review of the records showed that Apollo was not in violation of the FLSA. Mr. Strobel agreed with the characterization of the DOL investigation at issue as "poor," "bogus," "seriously flawed," "terrible," and a "rotten job." TT p. 84, p. 98 and p. 107. In connection with his interaction with the DOL in 1995 on behalf of Apollo (during the time when he had a private consulting practice), he tried to get the DOL to come back in and conduct a more complete investigation, in part by sending them memorandum after memorandum "begging – literally begging them to come back in." TT p. 32-33. Mr. Strobel did not want the DOL to take his word for it, but to come back in and look at the records, re-interview witnesses and confirm that errors had been made in their investigation. TT p. 32-33. The DOL refused to come back to Apollo for more information and the DOL's lead investigator, Frank McGriggs, "blew off" Mr. Strobel's request. TT p. 104.

Mr. Strobel informed the court that the DOL felt its allegations against Apollo were so "shaky" that the DOL

13. Transcript pages 98 through 104 shows a partial list of reasons for Mr. Strobel's substantial disagreement with the botched investigation of Apollo by the DOL.

"walked away" from the matter without even presenting the case to its own attorney (Solicitor of Labor) for further consideration, which, Mr. Strobel – in his 32 years of experience with the DOL – had only seen happen in about 12 cases of the 1,500 or so of which he had come into with contact during his DOL tenure. TT p. 28 and p. 123-124. The DOL *never* sent Apollo a letter demanding payment of the over $300,000 which its botched investigation claimed was allegedly owed. TT p. 104.[14] Nonetheless, the New Orleans office of the DOL took "statistical credit" for the big numbers it claimed to have found for employees in order to get "brownie points" with its superiors in Washington, D.C. TT p. 86-87 and p. 104-105. Mr. Strobel explained to the district court that the DOL even prepared a "correction" sheet for its file that showed that Apollo owed "zero." TT p. 105.

All of Mr. Strobel's testimony regarding the facts and nature of the referenced DOL investigation was *uncontroverted* at trial. Other than Mr. Strobel (who "hurt" Petitioners' case), Petitioners did not even bother to call any past or present DOL employees to testify at trial, presumably because Petitioners realized these witnesses would not help their case. Apollo contests any of Petitioners' factual representations in their Brief in contradiction of the evidence and facts set forth above.[15]

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14. The "standard" letters were not even mailed to the employees – but, rather, "modified 16(b)" letters were sent which did not state that monies were owed to the employee (rather, "may" was used), TT p. 26-27.

15. Pursuant to Supreme Court Rule 15.2, Apollo's legal counsel hereby points out the following additional perceived misstatements in the petition for writ of certiorari: (1) contrary to the assertion made in footnote 7, there was no testimony at trial to support any allegation of "safety problems" with respect to the issue addressed therein; (2) contrary to the assertion on page 5, Norman Landry was not "granted a vacation day"; (3) contrary to the assertion on page 6, Apollo never told its employees at the time of hiring that they would "average only 40 hours per week" — the trial judge did not find that any such

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REASONS FOR DENYING THE WRIT APPLICATION

A. Department of Labor Regulation Interpretation

Petitioners argue that the trial court and the court of appeals substituted their own interpretation for the interpretation of the DOL with regard to 29 C.F.R. 778.114. This argument is completely without merit, since these courts did not substitute their interpretation but rather merely *followed* an interpretation by the DOL of the FWW.

Section 778.114 provides that an employee paid a salary under the fluctuating workweek method must receive a fixed salary "for whatever hours he is *called upon to work*, whether few or many." Petitioners ignore the wording of the regulation and argue that employees can choose not to work when called upon to work and still receive a full salary for the workweek. Petitioners base this argument on Wage & Hour Opinion Letter No. 479, issued by the DOL in 1966 (attached to Petitioners' Brief as Appendix "E"), which stated that no deductions can be made from the salary of employees paid using the FWW pay plan. Petitioners suggest in their Brief that two district court opinions have cited to Letter No. 479 as "being good law." This statement is incorrect. Although one of these courts, the Southern

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misrepresentations existed; (4) contrary to the assertion on page 6, these plaintiffs did not "typically" earn "$500 per week" – the beginning base salaries of the six plaintiffs (not even considering their overtime premiums) averaged $2,316 per month; (5) contrary to the statement made in footnote 12, Apollo never admitted at trial that the DOL was following the dictates of DOL opinion letter No. 479; (6) contrary to the assertion on page 8, the courts did not fail to "acknowledge" that the DOL investigated Apollo, rather the courts disbelieved the alleged results of the botched investigation; (7) contrary to the assertion made in footnote 16, Apollo's expert did not testify that Apollo was "wanting its cake and eating it too," rather he testified that Apollo was properly paying its employees under the FWW; (8) contrary to the assertion on page 16, these employees were certainly not held "hostage in their employment by Apollo;" and (9) contrary to the assertion on pages 17-18, Melvin Smith did not testify that Safeguard Disposal Systems was his "current" employer.

District of New York, did cite to Letter No. 479, the other court specifically cited to Letter No. 479 and categorically *refused* to follow it, noting that disciplinary deductions are permissible. *Yourman v. Dinkins*, 865 F. Supp. 154, 164-65 (S.D.N.Y. 1994), *aff'd*, 84 F.3d 655 (2d Cir. 1996), *rev'd on other grounds*, *Giuliani v. Yourman*, 519 U.S. 1145 (1997); *Cash v. Conn Appliances, Inc.*, 2 F. Supp. 2d 884, 895 n.24, 25 (E.D. Tex. 1997).

Petitioners suggest that both the district court and the court of appeals incorrectly followed the more recent opinion letter issued in 1982, referred to throughout this litigation as the "Otter Letter," which was drafted by former DOL Administrator William Otter (a reprint of which is attached to Petitioners' Brief as Appendix "F"). The "Otter Letter" provides that, although generally the full salary must be paid as long as an employee performs any work in a workweek, **"[o]ccasional deductions may be made as a disciplinary measure for willful absences or tardiness."** Thus, Petitioners do not argue that the district court failed to follow an interpretation of the DOL which should be given persuasive authority; rather, Petitioners simply argue that the district court should have chosen a *less recent* interpretation issued by the DOL.

The district court correctly decided to follow the more recent opinion letter as to the permissibility of disciplinary deductions. Importantly, consistent with the "Otter Letter," the DOL's Field Operations Handbook – used by agency employees in enforcing compliance with the FLSA – provides that occasional disciplinary deductions for willful absence or tardiness may be made. *See* Field Operations Handbook, ¶32b04b, a reprint of which is attached hereto as Appendix "A." Mr. Strobel, the wage and hour expert, testified at trial that the DOL opinion letter relied upon by Petitioners (No. 479) was superceded by the 1967 change in the DOL's Field Operations Handbook, as well as by the 1982 "Otter Letter." TT p. 93.

Under the FLSA, an employer is clearly permitted to make certain deductions, or pay less than the full salary, in connection

with occasional disciplinary deductions for willful absences or tardiness. *See Cash v. Conn Appliances, Inc.*, 2 F. Supp. 2d 884 (E.D. Tx. 1997), (holding that numerous deductions made at "irregular intervals of time" as to five plaintiffs was insufficient to prove that the use of the FWW method of paying overtime was invalid); *see also* Field Operations Handbook, ¶32b04b (attached as Appendix "A" to this Brief); DOL, Wage and Hour Opinion Letter, May 26, 1982 (Otter Letter), attached as Appendix "F" to Petitioners' Brief; and DOL, Wage and Hour Opinion Letter, No. 988, 1969-73 Wages & Hours (CCH) ¶30,531 (May 1, 1969). The evidence at trial conclusively showed that disciplinary deductions were *occasional* under any definition and that each disciplinary deduction by Apollo was made for a willful absence or tardy.[16]

Quite surprisingly, Petitioners failed to cite to this Court the *most recent* Wage & Hour Opinion Letter on the subject of disciplinary deductions from the FWW pay plan salary. This DOL opinion letter, issued on May 28, 1999, sets forth the *same interpretation* as that set forth in the Otter letter and in the Field Operations Handbook – i.e., that occasional disciplinary deductions may be made for willful absences or tardiness. *See* 5/28/99, DOL Opinion Letter, 1999 WL 1002415, a reprint of which is attached to this Brief as Appendix "B." Thus, the most recent pronouncement of the DOL on the referenced issue supports the district court's and the court of appeals' holding that occasional disciplinary deductions may be made from the salary of FWW employees.

Both the district court and the court of appeals applied an interpretation of the subject regulation that has received DOL

16. As correctly noted by the Fifth Circuit Court of Appeals in its opinion in this case, even though 29 C.F.R. 778.114 provides for a fixed salary as "straight time pay for whatever hours [the employee] is called upon to work in a workweek," this does *not* mean that the employer must pay the full salary even though the employee decides not to work all the hours he is called upon to work. To hold otherwise, warned the Fifth Circuit, "would allow for a tremendous abuse of the FWW method by employees."

and judicial approval. Given that this interpretation is permissible and given the lack of other appellate court decisions weighing in on this issue, this matter is not ripe for decision by this Court.[17]

With regard to Petitioners' argument that the district court and the court of appeals should have asked the DOL to file an amicus brief in order to set forth its interpretation of the relevant regulation and opinion letters, it should be noted that Petitioners never requested the Fifth Circuit Court of Appeals to do so. Moreover, undersigned counsel does not recall such a request being made by Petitioners to the district court.

Nevertheless, why should the DOL have been asked to file an amicus brief when the district court and the court of appeals are undoubtedly authorized and empowered to read and interpret regulations and opinion letters issued by federal agencies, and do so every day of the week in cases across the country. It is not practical to suggest that each such federal court would be required to ask the particular federal agency that promulgated the regulation or opinion letter at issue in the matter to file an amicus brief. Such a paper intensive standard would unnecessarily drain precious resources from both the referenced federal agency, as well as from the federal judiciary. Moreover, Petitioners' protestation that an amicus brief should have been requested of the DOL on the subject issue is rendered moot by the most recent DOL opinion letter, which expressly permits an employer's occasional disciplinary deduction from the salary of workers paid under the FWW pay plan (*see* copy of said opinion letter attached to this Brief as Appendix "B").

17. It is interesting to note that the DOL opinion letters attached to Petitioners' Brief as Appendix G, Appendix H, Appendix I and Appendix J, were never cited to or presented by Petitioners to the district court or to the court of appeals. Thus, to suggest in their Brief that these referenced courts simply "ignored" such DOL opinion letters is misleading; rather, it was *Petitioners* who apparently ignored these DOL opinion letters until the time they filed their Petition for Writ of Certiorari with this Court. Nevertheless, the most recent DOL opinion letter supports Apollo's position in this case.

B. No Considerations Exist for Granting Writ of Certiorari

On page 11 of their Brief, Petitioners state that the Fifth Circuit Court of Appeals' opinion in the case at bar is the *only* decision by any federal court of appeals with regard to disciplinary deductions from the salary of workers paid pursuant to 29 C.F.R. 778.114. Petitioners argue that this fact *justifies* this Court's grant of a writ of certiorari. Apollo submits that exactly the *opposite* is true.

Under Rule 10 of the Supreme Court Rules, the primary focus of the considerations governing review of a petition for writ of certiorari is the presence of conflicts between or among the federal appellate circuits (which is not present in this case) and/or between or among the state courts of last resort when involving important federal questions (which is also not present in this case). The only basis left, therefore, for Petitioners to argue for a writ of certiorari is under subpart (c) of Rule 10, which requires a finding that a federal (or state) appellate court has decided an important question of federal law that has not been, but should be, settled by this Court. Unfortunately for Petitioners, such a situation does not exist in the present matter.

This Court should allow the federal courts of appeals adequate time to reach conclusions and resolve the issues complained of by Petitioners, instead of stepping in to write on a relatively clean judicial slate. For this Court to step in and decide matters of substantially first judicial impression would deviate from the standard set forth in Rule 10 of the Supreme Court Rules (which states that writs of certiorari should be granted "only for compelling reasons"). Moreover, there is no reason for this Court to grant a writ of certiorari when the only federal appellate court decision on the issue of disciplinary deductions from salaries of employees paid under the FWW play plan (i.e., the Fifth Circuit's decision in the case at bar) is *entirely consistent* with the DOL's most recent opinion letter on the subject matter, as well as with the DOL's Field Operations Handbook (*see* Appendix "B" and Appendix "A" to this Brief, respectively).

Petitioners' argument that "it is rarely economically feasible for attorneys to take these cases on a contingency fee basis" is belied by the fact that Petitioners' counsel has contingency fee contracts with all of the Petitioners in the present matter. In the past decade, undersigned counsel has defended at least than two other clients in FLSA collective actions where the plaintiffs were represented by legal counsel on a contingency fee basis.

Petitioners' statement that "wage and hour cases do not qualify for class action status" is misleading, since, as this Court is well aware, the FLSA authorizes "collective actions" for such claims under § 216(b). In collective actions, potential plaintiffs are permitted to "opt in" to the litigation after mailing of notification letters regarding the pending litigation. *See Hoffman-La Roche, Inc. v. Sperling*, 493 U.S. 164, 110 S. Ct. 482 (1989).

C. *Auer* Decision Not Applicable to 29 C.F.R. 778.114 Pay Plans

Petitioners next argue that the reasoning of this Court's decision in *Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905 (1997), should be found applicable to those workers who are paid pursuant to the FWW pay plan under 29 C.F.R. 778.114. This argument lacks merit.

In *Auer*, this Court addressed the issue of deductions from the salary of employees who are *completely exempt* from overtime requirements under the "white collar exemption" of the FLSA pursuant to 29 U.S.C. § 213(a)(4). *See also* 29 C.F.R. 541.118. The situation of salaried, exempt employees (who are paid *no* overtime at all, regardless of the number of hours worked) is *completely different* from the situation of employees paid using the FWW who are, in fact, paid overtime calculated in accordance with 29 C.F.R. 778.114. In *Auer*, this Court validated regulations promulgated by the Secretary of Labor that provide that employees who are exempt from the overtime requirements cannot have disciplinary deductions made from

their salary, except for infractions of safety rules of major significance.[18] The Court further held that for these salaried, exempt employees who receive *no overtime*, either making improper deductions or having a policy creating a significant likelihood that these deductions can be made can cause the overtime exemption to be lost.

In its opinion in *Auer*, this Court interpreted 29 C.F.R. 541.118 of the regulations, which explains the term "salary basis" for the white collar exemption. The FLSA, under the provision providing for the white collar exemption, requires that employees completely exempt from the overtime requirements be paid on a "salary basis." 29 U.S.C. § 213(a)(1). The DOL regulation interpreting this provision applicable to employees who are paid no overtime provides that

> an employee will be considered paid "on a salary basis" . . . if under the employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of this compensation, which amount is *not subject to* reduction because of variation in the quality or quantity of work.

Auer v. Robbins, 519 U.S. 452, 455, 117 S. Ct. 905, 909 (1997) (emphasis added). *See also* 29 C.F.R. 541.118. Thus, when this Court upheld the Secretary of the Labor's view that merely being "subject to" impermissible deductions could cause the loss of an exemption, it was actually interpreting and using language of a regulation specifically designed for and addressing the white collar exemption. This language is not present anywhere in the regulation addressing the FWW. *See* 29 C.F.R. 778.114.[19]

18. Of course, as discussed above, the DOL — in opinion letters and the Field Operations Handbook — has stated that occasional disciplinary deductions can be made from the salaries of employees paid using the FWW pay plan.

19. The term "salary basis" is used in 29 C.F.R. 778.114; however, as explained in *Cash v. Conn Appliance, Inc.*, 2 F. Supp. 2d 884 (Cont'd)

For these reasons, the *Auer* decision should not be expanded beyond its original holding to apply to employees paid using the FWW. This Court expressed no desire in the *Auer* decision for such an expansion, and the language of this decision does not call for one.

As the district court held in its well-reasoned opinion in the present matter, the principles outlined in the *Auer* decision for employees exempt from overtime requirements under 29 C.F.R. 541.118 do *not* apply to employees paid using the FWW. In their Brief, Petitioners have not cited to any cases that support a contrary conclusion.

In fact, in support of Apollo's position, the court in *Cash v. Conn Appliance, Inc.*, 2 F. Supp. 2d 884, 904-05 (E.D. Tex. 1997), held that the rules for salaried, exempt employees under the white collar exemption to the FLSA do *not* apply to employees paid using the FWW, based on the structure and text of the DOL regulations and on the legislative history of the regulations. Specifically, the *Cash* court found that the legislative history and the regulations lead to the conclusion that there was a distinct attempt by the Administrator of the DOL in promulgating the regulations to distinguish "salaried exempt employees falling within the white collar exemption from other workers who receive salaries." *Id.* at 905. The court further stated that the text and the history of the regulations lead to the conclusion that "[t]hey establish Section 541.118(a) as a mechanism to separate salaried employees coming within the white collar exemption from salaried employees falling beyond that exclusion, such as those whose overtime compensation is calculated using the fluctuation workweek method." *Id.*

Thus, the district court in the case at bar correctly followed the well reasoned opinion of the federal district court for Eastern District of Texas in finding that the regulations for employees

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(E.D. Tex. 1997), the Secretary of Labor did not intend that the rules for salaries applicable to exempt employees apply to employees paid using the FWW.

exempt from overtime requirements do not apply to employees paid overtime under the FWW. Nevertheless, the district court in the present matter was never forced to reach the issue of whether the principles laid out in the *Auer* case applied to the FWW for very important reasons. Most importantly, the trial court made the factual finding that Apollo employees were not in fact "subject to" any *improper* deductions, nor were any improper deductions made from the salaries of the six plaintiffs. With this factual finding, the issue of whether the principles outlined in the *Auer* decision applied to FWW employees did not have to be reached; thus, they should not be considered in connection with this application for writ of certiorari.

Despite the district court ruling that the more stringent rules for deductions for employees who are completely exempt from overtime pay requirements (under 29 C.F.R. 541.118) did not apply to employees paid using the FWW, it went a step further and found that *even if* these rules did apply, Apollo's method of making deductions *met* these rules as well, again leading to the conclusion that Apollo employees were *not*, in fact, "subject to" any improper policies on deductions. *See* ARJ p. 19. Thus, even under the principles outlined in the *Auer* decision, the district court found that Apollo's use of the FWW was proper. Petitioners are therefore basically requesting this Court to grant a writ of certiorari so that it can issue an *advisory* opinion (completely mooted out by findings of fact at the trial). Such a request by Petitioners is certainly not justified under Rule 10 of the Supreme Court Rules.

D. No Need to Revisit *Overnight Motor* Decision

The Petitioners set forth an emotional plea (under the guise of the *blue-collar* employee versus the *powerful* employer) for this Court to revisit its decision in the case of *Overnight Motor Transportation Co. v. Missell*, 316 U.S. 572 (1942), but there is no reason to do so. The *Overnight Motor* case has been cited and relied upon by countless federal courts for almost 60 years. In effect, Petitioners are asking this Court to issue either an advisory opinion (since the trial court made findings of fact

that all actions of Apollo were justified and proper) or to promulgate a judicial amendment to long-standing law and regulation (by adding qualifications and/or restrictions to either the FLSA or to 29 C.F.R. 778.114).

The obvious motive for Petitioners' referenced plea is because they do not like the well-established case law to the effect that FWW pay plans comply with the FLSA. Under the FWW, an employee receives a fixed salary for all hours worked in any workweek plus one-half times (instead of one and one-half times) the "regular rate of pay"[20] for all hours worked over 40 in any workweek.[21] 29 C.F.R. 778.114. The regular rate of pay is determined by dividing all hours worked in a workweek into all salary for that workweek. *Id.* Contrary to Petitioners' statements in brief, employees paid pursuant to the FWW do, in fact, effectively receive time and one-half for all overtime hours – i.e., the salary covers the "time" and the overtime premium calculated in accordance with 29 C.F.R. 778.114 covers the "one-half." In discussing the regular rate of pay, this Court stated almost 60 years ago that:

> [I]t is true that the longer the hours the less the rate and the pay per hour. This is not an argument,

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20. The regular rate of pay is defined by the Administrator of the Wage and Hour Division as a "rate per hour." *See* 29 C.F.R. 778.109. Generally, the regular rate is determined "by dividing . . . total remuneration for employment (except for statutory exclusions) in any workweek by the total number of hours actually worked by [the employee] . . . in that workweek for which such compensation was paid." *Id.* A "workweek" is a fixed and recurring seven consecutive twenty-four hours, as set by the employer. 29 C.F.R. 778.105.

21. For example, if an employee has a salary of $500 per week and that employee works fifty hours in one workweek, the regular rate of pay for that employee for that workweek would be $10 per hour. For all hours worked over forty by that employee in that workweek (i.e., ten hours), that employee would receive an additional one-half of the regular rate of pay or $5. Thus, the employee's pay for all overtime hours during said workweek would actually be $15 per hour.

> however, against this method of determining the regular rate of employment for the week in question.

Overnight Motor, supra.[22]

Petitioners assert on page 15 of their Brief that this Court created a "narrow exception" to the FLSA in the *Overnight Motor* case. This statement is misplaced since the FWW is not an *exception* to the FLSA, but is an *alternate method* of complying with the federal statute. *See Yadav v. Coleman Oldsmobile, Inc.*, 538 F.2d 1206 (5th Cir. 1976), ("The application of the 'fluctuating workweek' formula is not at all dependent upon a finding that the employer is entitled to the *exception* commonly known as the 'Belo' provision."); *Bailey v. County of Georgetown*, 94 F.3d 152, 154 at n.5 (4th Cir. 1996), (778.114 is not an "exception" to the FLSA, but rather an alternate means of complying); and *Flood v. New Hanover County*, 4 Wage and Hour Cases 2d (BNA) 139 (4th Cir. 1997), ("778.114 does not represent an 'exception' to the FLSA").

Petitioners argue that the Fifth Circuit Court of Appeals decision in the present case has "eliminated" the guaranteed salary requirement under the FWW. Nothing could be further from the truth, since the Fifth Circuit merely agreed with the DOL's Field Operations Handbook and its opinion letters which allow occasional disciplinary deductions to be taken from the salaries paid to employees pursuant to the FWW. If the employee does not willfully absent himself from work (thus causing the employer to consider an occasional disciplinary deduction), then said employee will be paid his full FWW salary for the week in question.

Petitioners' arguments that Apollo's pay plan gave it a competitive advantage over its competitors is totally without merit. The district court specifically found that Apollo did nothing wrong and, in fact, paid the plaintiffs everything they

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22. As noted by the district court in the case at bar, the particular employees before this Court in the *Overnight Motor* case averaged 65 hours of work per week.

were owed – and even more. MJJL Tr. P. 65. Thus, Petitioners' attempt to use such generalized policy arguments are misplaced under the detailed factual findings in this case.

CONCLUSION

For the reasons set forth above, Apollo prays that Petitioners' application for writ of certiorari be denied. Petitioners' plea to either have this Court overrule its *Overnight Motor* case, or to embrace their position that playing "hooky" should have no consequences, in the work place should be rejected.

Respectfully submitted,

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APPENDIX

APPENDIX A — DOL FIELD OPERATIONS HANDBOOK ¶ 32b04(b)

32b04b *Irregular hours worked.* (a) If an employee is given a stipulated salary with the understanding that it constitutes straight time pay for all hours he works, and if his hours of work fluctuate from week to week, his regular rate of pay ordinarily will vary form week to week in accordance with the number of hours worked each week. The regular rate, of course, cannot be less than the applicable MW. Since straight time compensation has already been paid, such an employee must receive additional OT compensation for each OT hour in a particular w/w computed at not less than one-half the regular rate obtained by dividing the weekly salary by the number of hours worked in that w/w. If the employer to avoid weekly computations chooses to pay extra half-time based on the salary divided by 40 hours, such a method is permissible.

(b) The above rule will apply where an employee works a varying number of hours, and normally receives his full salary regardless of how few the scheduled hours may be in a particular week, even though *occasional* disciplinary deductions for wilful absence or tardiness are made. Disciplinary deductions, of course, may not cut into the MW or OT pay required by the Act.

(c) Similarly, an employee employed on a fixed salary basis for irregular hours of work may be paid a pro rata share of his salary in the initial or terminal week of his employment, when he is not in payroll status for the entire week.

APPENDIX B — DOL OPINION LETTER DATED MAY 28, 1999

Wage and Hour Division
United States Department of Labor
Opinion Letter
Fair Labor Standards Act (FLSA)

May 28, 1999

* * *

This is in response to your letter concerning the application of the fluctuating workweek method of paying overtime. We regret the delay in responding.

Under section 778.114 of Interpretative Bulletin, 29 C.F.R. 778, an employee employed on a salary basis may have hours of work which fluctuate from week to week and the salary may be paid pursuant to an understanding with the employer that the employee will receive such fixed amount as straight time pay for whatever hours the employee is called upon to work in a workweek, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation (apart from overtime premiums) for the hours worked each workweek, whatever their number, rather than working for 40 hours or for some other fixed weekly work period, such a salary agreement is permitted by the Fair Labor Standards Act (FLSA) if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked in those workweeks in which the number of hours the employee works is greatest, and if the employee receives extra compensation, in addition to such salary, for

all overtime hours worked at a rate not less than one-half the employee's regular rate of pay. This is often referred to as the fixed salary for fluctuating hours or the "fluctuating workweek."

Since the salary in such a situation is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week, and is determined by dividing the number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for that week. Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary agreement.

Your client has proposed paying employees by the fluctuating workweek method with the following conditions:

- If the employer fails to provide work for the full workweek the employee will receive their full salary.

- If the employee is absent from work for a full day to take care of personal business, the employer will charge one day's vacation against the employee's accrued vacation, thus there will be no reduction in pay. If the employee has not accumulated any vacation days, the employer may dock their salary 1/7th of their weekly salary amount.

- If the employee is absent from work because of personal illness, the provisions of the Family and Medical Leave Act (FMLA) Regulations Part 825, Section 825.206 will apply unless the illness does not qualify under the FMLA. If the illness does not qualify under the FMLA, the employer will charge the day against the employee's allowance for sick leave. If the employee has no sick days, e.g., a new employee, or if the employee has used all their sick days allowance, the employer may dock the employee's salary 1/7th of the weekly salary amount.

- Absences that qualify as bona fide FMLA leave will be made in accordance with the Regulations, Part 825.206.

You further state that this proposal for handling deductions from the fluctuating workweek salary method of payment is "patterned" after the "salary basis" method of payment set forth in the Regulations, Part 541, Section 541.118.

Based on the above conditions, we do not agree that your client may meet his overtime pay obligations by use of the fluctuating workweek. The discussion of "salary basis of payment" contained in 29 CFR §§541.118 refers to the salary requirements for employees who may qualify for exemption from the minimum wage and overtime pay requirements under §§13(a)(1) of the FLSA, and not to the salary requirements under the fluctuating workweek method of compensation. Deductions for absences for personal business

or routine sickness generally may not be made from the salary of an employee paid on a fluctuating workweek basis. However, disciplinary deductions, which do not cut into the required minimum wage or overtime compensation, may be made for willful absences or tardiness or for a situation such as an employee being sent home from work because of drunkenness.

Section 825.206(b) of the Regulations, Part 825 discusses the interplay between the FMLA and the fluctuating workweek method of payment. For an employee paid according to the fluctuating workweek method, who is utilizing intermittent or reduced schedule FMLA leave, the employer may during the period of the leave compensate the employee on an hourly basis and pay only for the hours worked, including time and one-half the employee's regular rate for overtime hours. If the employer does not elect to convert the employee's compensation to an hourly basis, no deduction may be made for FMLA leave absences.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein.

Sincerely,

Daniel F. Sweeney
Office of Enforcement Policy Fair Labor Standards Team